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No. 337

In the Supreme Court of the United States

OCTOBER TERM, 1960

DAVID GINSBURG ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	2
Argument	4
Conclusion	9
Appendix	10

CITATIONS

Cases:	
Brinck v. *United States*, 173 F. Supp. 286	7
Crolich v. *United States*, 144 F. Supp. 109	7
Grimsley v. *Patterson*, decided October 31, 1957 (T.C.)	7
Symonides v. *Crenshaw*, decided October 27, 1953 (T.C.)	7
Statutes:	
Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):	
Sec. 272(a)(1)	7, 10
Sec. 273	2, 5, 6, 10
Sec. 273(a)	5, 7, 10
Sec. 273(b)	10
Sec. 273(f)	3, 4, 5, 8, 10
Sec. 273(i)	5, 10

Statutes—Continued

Internal Revenue Code of 1939—Continued

Page

Sec. 292(a) 12

Sec. 293(b) 13

Sec. 294(b) 3, 4, 6, 7, 13

Sec. 294(c) 6, 8, 13

Sec. 297 ..... 5, 8, 14

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 6601(a) 8

Sec. 6601(f)(2) 8

Miscellaneous:

H. Rep. No. 1337, 83d Cong., 2d Sess., p. A417 (3 U.S.C. Cong. & Adm. News 4017, 4565 (1954)) 8

S. Rep. No. 1622, 83d Cong., 2d Sess., p. 589 (3 U.S.C. Cong. & Adm. News 4621, 5238 (1954)) 8

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 14–20) is reported at 278 F. 2d 470.

JURISDICTION

The judgment of the Court of Appeals was entered on April 18, 1960, and a timely petition for rehearing was denied on May 20, 1960. The petition for a writ of certiorari was filed on August 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 294(b) of the Internal Revenue Code of 1939 provides that where a deficiency, or any interest

or additional amounts assessed in connection therewith, is not paid in full within ten days from the date of notice and demand, there shall be collected, as a part of the tax, interest upon the unpaid amount from the date of notice and demand until the date of payment.

Is the Commissioner prohibited from collecting such interest upon that portion of the amount of a jeopardy assessment which includes deficiency interest merely because no bond to stay collection was filed by the taxpayer?

STATUTES INVOLVED

Sections 272(a)(1), 273 (a), (b), (1), (4), 294 (b), (c), and 297 of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 10–14.

STATEMENT

This action originates as one in which taxpayers, husband and wife, sought to recover interest paid in connection with jeopardy assessments of income tax for the years 1946 and 1950. There was no dispute as to the material facts, most of which were stipulated (R. 15–16), and both parties moved for summary judgment.

On or about March 21, 1952, the Commissioner of Internal Revenue, acting under authority of Section 273 of the Internal Revenue Code of 1939, Appendix, *infra*, p. 10, made jeopardy assessments against the taxpayers for the years 1946 and 1950. The amount of the assessments included the tax deficiency as determined by the Commissioner, a fraud penalty, and interest to the date of assessment. The taxpayers

petitioned the Tax Court of the United States for a redetermination of the deficiencies found for each year, but filed no bond under Section 273(f) to stay collection. The Commissioner, nevertheless, did not enforce collection although notice and demand for payment had been made. Pursuant to the stipulations executed by the parties, the Tax Court entered decisions holding the taxpayers liable for deficiencies less than those assessed by the Commissioner. The jeopardy assessments were revised to show deficiencies, interest, and penalties conforming to the Tax Court decisions and the balance of each of the jeopardy assessments was abated. Taxpayers paid the amount of the revised assessments. (R. 15–16, 17.)

Acting under the provisions of Section 294(b), the Commissioner than computed and assessed interest on the total amount of the revised assessment for each of the taxable years. Taxpayers paid these amounts, and filed timely claims for refund. (R. 16, 17–18.)

Both parties moved for summary judgment. (R. 14.) The District Court held that, since no bond had been filed to stay collection of the jeopardy assessments, the provisions of Section 294(b) were applicable, and hence that the Commissioner properly assessed interest on the interest included in the jeopardy assessments. Accordingly, it granted the motion of the United States for summary judgment, but, due to errors in computation of delinquency interest assessments which resulted in an actual overpayment by the taxpayers, and pursuant to stipulation of the parties, the court entered judgment for the taxpayers in the amount of $446.76. (R. 16, 18–19.)

On appeal, the Court of Appeals for the First Circuit affirmed the judgment of the District Court, and subsequently denied the taxpayers' petition for rehearing. (Pet. 17, 20.)

ARGUMENT

This case presents a narrow issue which was correctly decided by the courts below, and there is no conflict. Moreover, the issue is not a recurring one since it arises under provisions of the Internal Revenue Code of 1939 which do not appear in the 1954 Code.

1. The issue here concerns the right of the Commissioner of Internal Revenue to assess and collect interest on deficiency interest under Section 294(b) of the Internal Revenue Code of 1939 in the case of jeopardy assessments, where no bond had been filed as provided in Section 273(f). Both courts below held that the assessment and collection of such interest on interest was clearly provided for by statute. Rejecting taxpayers' contention that such action constituted discrimination based upon their failure to file a bond, the Court of Appeals stated (Pet. 16):

> A party on whom there has been a jeopardy assessment, but who has posted no bond, is charged thereafter with interest upon interest from the date of notice and demand by the collector as the result of sections 292(a) and 294(b), combined. On the other hand, a taxpayer against whom there has been a jeopardy assessment, but who has posted a bond, will eventually pay the same interest on interest

as a result of sections 273(i) and 297. No discrimination results from the failure to file a bond.

Section 273(a) provides that, if the Commissioner believes that the collection of an asserted deficiency will be "jeopardized by delay," he shall immediately assess such deficiency "together with all interest, additional amounts, or additions to the tax provided for by law," and serve notice and demand for its payment. Section 273(f) permits a taxpayer who receives a jeopardy assessment notice and demand to file a bond and to "obtain a stay of collection of the whole or any part of the amount of the assessment," pending the determination of the correct tax. Section 273(i) provides that when the amnt which should be assessed has been determined the Tax Court, "any unpaid portion, *the collection of which has been stayed by the bond*, shall be collected as part of the tax upon notice and demand from the collector," and any remaining portion of the tax shall be abated (emphasis added).

Complementing Section 273 is Section 297, which requires the collection as a part of the tax of interest upon the amount stayed by the bond, from the date of notice of the jeopardy assessment to the date of notice and demand under Section 273(a). Section 297 says nothing with respect to a case, such as the instant one, where a taxpayer has failed to file a bond to stay the collection of a jeopardy assessment pending a final determination of such assessment by the Tax Court; it is operative only where a bond has been

filed under Section 273. However, where no bond has been filed, Section 294(b) applies; this is evident from the provisions of Section 294(c), wherein Congress explicitly excluded from the coverage of Section 294(b) the situation where a taxpayer failed to pay the jeopardy assessment because he had posted the bond. In such a situation, Congress provided that Section 294(b) "shall not apply to the amount covered by the bond," leaving the clear inference that it does apply to amounts in excess of or amounts not covered by a bond. Furthermore, Section 294(b) clearly authorizes the imposition of the interest here in question, for it provides that—

> Where a deficiency, *or any interest or additional amounts assessed in connection therewith* under section 292, or under section 293, or any addition to the tax in case of a delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, *interest upon the unpaid amount* at the rate of 6 per centum per annum from the date of such notice and demand until it is paid * * * [emphasis added].

Obviously, Section 294(b) concerns itself with *deficiencies* and *additions to the tax* considered as part of the tax deficiencies, without any attempt to distinguish between the two methods of assessment, *i.e.*, ordinary or jeopardy.

These provisions of the 1939 Code amply support the construction made by the Commissioner and sus-

tained by the courts below. The position of the Government is also supported by *Brinck* v. *United States*, 173 F. Supp. 286 (D. Mont.); *Grimsley* v. *Patterson* (N.D. Ala.), decided October 31, 1957 (57-2 U.S.T.C., par. 10,025); *Symonides* v. *Crenshaw* (E.D. Va.), decided October 27, 1953 (53-2 U.S.T.C., par. 9,639). But see *Crolich* v. *United States*, 144 F. Supp. 109 (S.D. Ala.), which apparently has not been followed.

Taxpayers' confusion stems from a failure to perceive the interrelation of the various statutory provisions dealing with assessment and collection of interest. Under the normal assessment procedure, an assessment is made only after notice has been given to the taxpayer, indicating the amount of the proposed deficiency, and after allowing 90 days in which to petition the Tax Court to set it aside. Should the taxpayer elect to exercise his right to appeal from the Commissioner's proposed deficiency, there can be no assessment until after the final redetermination by that tribunal. Internal Revenue Code of 1939, Section 272(a)(1) (Appendix, *infra*, p. 10). If the 90-day period expires, however, without the taxpayer having taken advantage of his right to appeal to the Tax Court, the *deficiency is assessed, together with interest* from the date upon which the tax was originally due to the date of such assessment, and interest upon *that total* sum may be collected by virtue of Section 294(b). But in the case of a jeopardy assessment, the deficiency and the assessment arise simultaneously, and the provisions of Section 273(a) unmistakably declare that the jeopardy assessment shall

include interest from the due date of payment to the date of the assessment. The taxpayer still has his right of appeal to the Tax Court. He may stay collection of the amount assessed by filing a bond as provided in Section 273(f). Section 297 provides that, *if* he files such a bond, the amount thereby covered is chargeable with interest at six per cent from the date of the jeopardy assessment to the date of actual payment. If he files no bond, then, by virtue of Section 294(c), the deficiency is treated like any other deficiency, and the taxpayer is charged with the same delinquency interest. Thus, contrary to taxpayers' contention, no discrimination results from failure to file a bond. Indeed, to relieve taxpayers of the obligation to pay interest on assessed deficiency

2. In any event, the problem is of no future importance since, as noted in the opinion below (Pet. 17, fn. 4), the provisions of the Internal Revenue Code of 1939 relating to interest on interest were discontinued in the 1954 Code. While Section 6601(a) of the 1954 Code states the general rule that interest on under-payments of tax runs from the due date of payment to the date paid, Section 6601(f)(2) expressly provides that "[n]o interest under this section shall be imposed on the interest provided by this section." See H. Rep. No. 1337, 83d Cong., 2d Sess., p. A417 (3 U.S.C. Cong. & Adm. News 4017, 4565 (1954)); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 589 (3 U.S.C. Cong. & Adm. News 4621, 5238 (1954)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1960.

APPENDIX

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) [As amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 273. JEOPARDY ASSESSMENTS.

(a) *Authority for Making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay,

he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) *Deficiency Letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

* * * * * *

(f) *Bond to Stay Collection.*—When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Tax Court which has become final, together with interest thereon as provided in section 297. If any portion of the jeopardy assessment is abated by the Commissioner before the decision of the Tax Court is rendered, the bond shall, at the request of the taxpayer, be proportionately reduced.

* * * * * *

(i) *Collection of Unpaid Amounts.*—When the petition has been filed with the Tax Court and when the amount which should have been assessed has been determined by a decision of the Tax Court which has become final, then any unpaid portion, the collection of which has been stayed by the bond, shall be collected as part

of the tax upon notice and demand from the collector, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 322, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the collector.

* * * * *

(26 U.S.C. 1952 ed., Sec. 273.)

SEC. 292. INTEREST ON DEFICIENCIES

(a) [As amended by Sec. 2(a)(1) of the Act of December 17, 1943, c. 346, 57 Stat. 601, and Sec. 14(c), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *General Rule.*— Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

* * * * *

(26 U.S.C. 1952 ed., Sec. 292.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).

* * * * *

(26 U.S.C. 1952 ed., Sec. 293.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

* * * * *

(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272(i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

(c) *Filing of Jeopardy Bond.*—If a bond is filed, as provided in section 273, the provisions of subsection (b) of this section shall not apply to the amount covered by the bond.

* * * * *

(26 U.S.C. 1952 ed., Sec. 294.)

SEC. 297. INTEREST IN CASE OF JEOPARDY ASSESSMENTS.

In the case of the amount collected under section 273(i) there shall be collected at the same time as such amount, and as a part of the tax, interest at the rate of 6 per centum per annum upon such amount from the date of the jeopardy notice and demand to the date of notice and demand under section 273(i), or, in the case of the amount collected in excess of the amount of the jeopardy assessment, interest as provided in section 292. If the amount included in the notice and demand from the collector under section 273(i) is not paid in full within ten days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid.
(26 U.S.C. 1952 ed., Sec. 297.)

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